IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1867

JOSEPH LINDSAY CRANFORD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Petitioner, Joseph Lindsay Cranford, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland entered in this proceeding on April 3, 1978.

OPINION BELOW

The opinion of the Court of Appeals of Maryland, not yet reported, appears in the Appendix hereto. (App. A *infra.*) The opinion of the Court of Special Appeals of Maryland is reported at 36 Md. App. 293, 373 A.2d 984 (1977) and appears in the Appendix hereto. (App. B *infra*).

JURISDICTION

The opinion of the Court of Special Appeals of Maryland was filed on June 9, 1977. The Court of Appeals of Maryland issued an Order on September 8, 1977 granting the petitioner's Petition for Writ of Certiorari. After having considered the briefs of both parties and after hearing considered oral argument, the Court of Appeals of Maryland issued an Order on April 3, 1978 dismissing the petitioner's Petition for Writ of Certiorari as having been improvidently granted. A timely motion for reconsideration was denied on May 2, 1978 and the mandate of that Court issued on May 3, 1978. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

WHETHER THE PETITONER WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN HIS CONVICTION WAS AFFIRMED ON APPEAL BY RELIANCE ON A THEORY OF SUBSTANTIVE CRIMINAL LAW WHICH WAS NOT LITIGATED AT THE TRIAL AND WHICH HE WAS NOT GIVEN AN OPPORTUNITY TO REBUT?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopaardy of life or limb . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defense.

Amendment XIV

. . . nor shall any State deprive any person of life, liberty or property without due process of law . . .

STATEMENT OF THE CASE

Petitioner, Joseph Lindsay Cranford, was indicted and charged with murder in the first degree (Md. Ann. Code Art. 27 §407, (1957)) and accessory after the fact to murder (a common law crime with no maximum statutory penalty). His co-defendant William Lewis Wright (the cases were severed for trial) was charged only with murder in the first degree. Neither Cranford nor Wright were charged with felony murder (Md. Ann. Code Art. 27 §§408, 409, 410 (1957)). After a trial by jury Cranford was found guilty of the lesser included offense of second degree murder (Md. Ann. Code Art. 27 §411 (1957)). (The charge of accessory after the fact to murder was nol

prossed by the State of Maryland over Cranford's objection, before the jury was sworn.)

The evidence indicated that Cranford and his brother-in-law co-defendant, Wright, had been drinking and partying at a restaurant at the conclusion of which Wright picked up a Mrs. Bunton and the three of them left in Cranford's automobile. Cranford attempted to have sexual intercourse with the woman in the back seat of the automobile, but was unable to do so because both he and the women were too drunk. Cranford then drove the automobile with Wright and Mrs. Bunton in the back seat. Shortly thereafter, Wright told Cranford to stop the car and Wright got out into the front seat of the automobile. Cranford then for the first time noticed blood on Wright's hand and was told by Wright that the woman was having a miscarriage and that they would have to let her off. Cranford and Wright then lifted Mrs. Bunton from the automobile and Wright then took her to the side of the road and left her there.

Cranford testified that while he noticed blood on the rear seat he had no indication that Mrs. Bunton was at all injured, but rather thought she was either having her period or was having a miscarriage. Cranford testified that he had no idea that Mrs. Bunton was going to die. Cranford and Wright then drove to Wright's apartment where Cranford gave into Wright's request and disposed of Wright's clothing. Mrs. Bunton was found dead the next day. The cause of death was a stab wound which severed the left iliac artery in the area of the vagina and rectum which caused Mrs. Bunton to bleed to death in a matter of minutes.

Thereafter Cranford timely appealed as of right to the Court of Special Appeals of Maryland and argued that his conviction should be reversed because of the insufficiency of the evidence under State law. However, the State of

Maryland asserted that Cranford's insufficiency of the evidence arguments were immaterial and instead argued that his conviction for second degree murder should be affirmed because of a common criminal design analysis, citing the felony murder rule. The Court of Special Appeals of Maryland then affirmed the petitioner's conviction relying upon the legal analysis of the felony murder rule.

Cranford filed a fimely motion for reconsideration of decision with the Court of Special Appeals of Maryland and argued that the felony murder rule was mentioned for the first time in the case on appeal in that Court and that he had not been given an opportunity to litigate the issue of felony murder at the trial. The motion was denied without opinion.

Cranford then framed his Federal Constitutional issue in a writ of certiorari filed with the Court of Appeals of Maryland. Cranford asserted that he had been denied due process of law because the State of Maryland argued on appeal a new theory which was not litigated at the trial and which Cranford was not given an opportunity to rebut at trial. The Court of Appeals of Maryland granted Cranford's petition for Writ of Certiorari by Order of Court dated September 8, 1977. The issue was briefed, oral argument was heard, but the Court of Appeals of Maryland issued an Order without opinion on April 3, 1978 dismissing the petition as having been improvidently granted. A timely motion for reconsideration was filed on April 27, 1978 and was denied on May 2, 1978.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD DECIDE WHETHER NOTICE OF THE SUBSTAN-

TIVE ELEMENTS OF THE CRIME CHARGED IS AN INTEGRAL DUE PROCESS PROTECTION OF THE FOURTEENTH AMENDMENT AS THAT AMENDMENT INCORPORATES THE NOTICE PROTECTION OF THE SIXTH AMENDMENT.

Petitioner was charged with murder in the first degree. He was not charged with an underlying felony nor was he specifically charged with felony murder. Felony murder was never litigated in any way at his trial. The felony murder rule was mentioned for the first time in the case by the State of Maryland in its brief filed in the Court of Special Appeals of Maryland. That Court in turn relied upon the felony murder rule in affirming the Petitioner's conviction for second degree murder.

This addition of the crime of felony murder at the appellate stage introduced a new charge into the proceedings not contained in the indictment and not litigated at the trial of the case.

This Court has held that an indictment must set forth all of the elements necessary to constitute the offense intended to be punished, *United States v. Carll*, 105 U.S. 611 (1881), and that it must charge with precision and certainty. Every ingredient which comprises the offense must be accurately and clearly alleged. *Evans v. United States*, 153 U.S. 584 (1894). However, it is unclear whether these rules emanate from the Fifth Amendment indictment clause or from the Sixth Amendment notice clause.

This Court in *In Re Oliver*, 333 U.S. 257 (1948) has held that the Sixth Amendment protection of notice of the crime charged applies to the States under the due process clause of the Fourteenth Amendment. And in *Cole v.*

Arkansas, 333 U.S. 196 (1948) this Court held that the procedural due process protections of notice of the specific charge and the chance to be heard on those charges applied to proceedings on appeal as well as proceedings at trial.

This question of the notice of the substantive elements of the crime charged and the subsequent amendment of that notice has been recently addressed by the Circuit Courts of Appeal. *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977) and *United States v. Smolar*, 557 F.2d 12 (1st Cir. 1977). Both *Watson* and *Smolar* held that a change in the theory of the substantive elements of the crime charged was a denial of due process of law under both the Fifth and Sixth Amendments.

The change in the theory of the substantive elements of the crime charged in the instant case, from pre-meditated murder to felony murder, violates the dictates of *Cole v. Arkansas, supra*, as that case has been interpreted by *Watson v. Jago, supra*.

This Court should review the instant case to decide the important federal constitutional issue of whether the due process clause of the Fourteenth Amendment as it incorporates the notice clause of the Sixth Amendment requires that an indictment allege the substantive elements of the crime charged and whether a change in theory of the elements of the crime charged between the time of trial and the time of appeal violates that right.

A change in theory of the crime charged between trial and appeal also violates the Sixth Amendment protection of effective assistance of counsel because it allows a person to be convicted of a crime without his having had an opportunity to effectively prepare a defense. *Powell v. Alabama*, 287 U.S. 45 (1932).

Such a change in theory also violates the Fifth Amendment protection against double jeopardy because it allows the State to allege one crime of murder at trial (premeditation) and a different crime of murder on appeal (felony murder) and thus convict a person of two separate crimes of murder based upon a common nucleus of operative facts. *Benton v. Maryland*, 395 U.S. 784 (1969).

II

THIS COURT SHOULD RECONSIDER *HURTADO V. CALIFORNIA* DECIDED IN 1884 AND DECIDE WHETHER THE FIFTH AMENDMENT PROTECTION OF INDICTMENT BY GRAND JURY SHOULD BE APPLIED TO THE STATES UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Petitioner was indicted by a State of Maryland Grand Jury and charged with murder in the first degree but was convicted of the lesser included offense of murder in the second degree. He was not charged with an underlying felony nor was he charged with felony murder. However, his conviction was affirmed when the State of Maryland argued on appeal for the first time in the case the felony murder rule and when the Court of Special Appeals of Maryland relied upon the felony murder rule to support its order of affirmance. The felony murder rule was never litigated at the trial.

Maryland law apparently does not require separate indictments for premeditated first degree murder and felony murder. *Weighorst v. State*, 7 Md. 42 (1885). However,

federal constitutional law under the Fifth Amendment indictment clause clearly requires that the substantive elements of felony murder be set out in the murder indictment. *Ornelas v. United States*, 236 F.2d 392 (9th Cir. 1956); *United States v. Antelope*, 377 F.Supp. 193 (D.C. Idaho, 1974), *aff'd on rehearing*, 555 F.2d 1376 (9th Cir. 1977).

Federal constitutional law also holds that a change in the substantive theory of the crime charged is a constructive amendment of the indictment in violation of *Stirone v. United States*, 301 U.S. 212 (1960) and *Ex Parte Bain*, 121 U.S. 1 (1887) and denies an accused due process of law under the Fifth Amendment indictment clause. *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977) and *United States v. Smolar*, 557 F.2d 12 (1st Cir. 1977). Under such an analysis the conviction in the instant case would surely be reversed because of a constructive amendment of the indictment (from premeditated murder to felony murder), but the rule of *Hurtado v. California*, 110 U.S. 516 (1884) prevents this Court from applying the Fifth Amendment indictment protections to State court proceedings.

The important federal constitutional issue presented by this case is whether or not the due process clause of the Fourteenth Amendment incorporates the indictment clause of the Fifth Amendment which would then in turn be made applicable to the States. *Hurtado v. California, supra*, should be reconsidered.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Maryland.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 75

September Term, 1977

JOSEPH LINDSEY CRANFORD

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
Levine
Eldridge
Orth
Cole,
JJ.

ORDER OF COURT

Filed: April 3, 1978

JOSEPH LINDSEY CRANFORD	*	In The
	*	Court of Appeals
v.	*	of Maryland
	*	No. 75
STATE OF MARYLAND	*	September Term,
	*	1977
	*	

ORDER

The petition for writ of certiorari having been granted and heard, it is this third day of April, 1978

ORDERED, by the Court of Appeals of Maryland, that the writ of certiorari be, and it is hereby, dismissed, the petition having been improvidently granted; appellant to pay costs.

/s/ Robert C. Murphy
Chief Judge

JOSEPH LINDSEY CRANFORD	*	In The
	*	Court of Appeals
v.	*	of Maryland
	*	No. 75
STATE OF MARYLAND	*	September Term,
	*	1977
	*	

MANDATE

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of *Joseph Lindsey Cranford v. State of Maryland* came before you and wherein the judgment of the said Court of Special Appeals of Maryland was duly entered on the ninth day of June, 1977 as appears from the transcript of the record of the said Court of Special Appeals of Maryland which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated September 8, 1977; and

WHEREAS in the September Term, 1977 the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordred and adjudged on April 3, 1978 by this Court that the writ of certiorari be dismissed, petition having been improvidently granted; appellant to pay costs.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause in conformity with the judgment of this

Court above stated as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS the Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland this third day of May, 1978.

/s/ James H. Norris, Jr.
Clerk
Court of Appeals of Maryland

April 27, 1978: Motion for reconsideration filed by appellant.
May 2, 1978: Above motion denied.

Costs:

Petition filing fee	$ 20.00
Appellant's brief	153.83
Record extract	321.30
Appellant's supp'l brief	126.00
Appellee's brief	Not supplied
Motion for Reconsideration	$ 10.00

APPENDIX B

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
No. 751A and No. 751B
September Term 1976

NO. 751A
JOSEPH LINDSEY CRANFORD
V.
STATE OF MARYLAND

NO. 751B
WILLIAM LEWIS WRIGHT
V.
STATE OF MARYLAND

Thompson,
Powers,
Melvin,
JJ.

Opinion by Melvin, J.

Filed: June 9, 1977

By the first count of an indictment filed 1 October 1975, the Grand Jury of Prince George's County charged the appellants, William Lewis Wright and Joseph Lindsey Cranford II, both age 25, with murdering Mary Ann Bunten, age 51, on or about September 1975. The second count of the indictment charged Cranford with being an accessory after the fact to her murder, alleged in that second count to have been committed by Wright alone. After separate jury trials in the Circuit Court for Prince George's County, the appellants were each convicted of second degree murder under the first count of the indictment. Before the jury was sworn for the trial of Cranford (the first to be tried) and over Cranford's objection, the trial granted the State's motion "to nol-pros" the second count.

Although tried separately and represented by different counsel, both appeals come to us in one record. We shall consider each appeal separately.

APPELLANT WRIGHT (CASE NO. 751 B)

Wright presents a single question in his appeal: "Did the trial court commit plain error by instructing the jury about the standard for sufficiency of the evidence?"

At the close of all the evidence, appellant's motion for judgment of acquittal was denied. In the course of his advisory instructions to the jury, the trial judge said:

> "The test of sufficiency of the evidence has been established as being whether the evidence either shows directly or supports a rational inference of the facts to be proved from which you, the trier of the facts, could fairly be convinced beyond a reasonable doubt of the Defendant's guilt of the offense charged."

* * *

> "To be sufficient in law to justify a conviction, the admissible evidence adduced must show directly or circumstantially or support a rational inference of the facts to be proved from which you, the trier of the facts, could fairly be convinced beyond a reasonable doubt of the Defendant's guilt of the offense charged."

The appellant did not object to any of the court's instructions. He, nevertheless, argues that, pursuant to Maryland Rule 756 g, we should recognize the above-quoted portions as "plain error". Rule 756 g provides:

> "Upon appeal a party assigning error in the instructions may not assign as of right an error unless (1) the particular portion of the instructions given or the particular omission therefrom or the particular failure to instruct was distinctly objected to before the jury retired to consider its verdict and (2) the grounds of objection were stated at that time. Ordinarily no other error will be considered by the Court of Appeals, but the Court of Appeals either of its own motion or upon the suggestion of a party may take cognizance of and correct any plain error in the instructions, material to the rights of the accused even though such error was not objected to as provided by section f of this Rule."

While the now-challenged portions of the instructions correctly state the substance of the legal test to be applied by a trial judge when ruling on a motion for a judgment of acquittal Code, Art. 27, §593; *Williams and McClelland v. State,* 5 Md. App. 450, 247 A.2d 731 (1968); *Vuitch v. State,* 10 Md. App. 389, 271 A.2d 371 (1970), they have no place in instructions to the jury and should be avoided. If this were all the judge told the jury regarding the standard of proof necessary for conviction, we would unhesitatingly take cognizance of and correct the plain error by awarding a new trial even though no exceptions were taken below. To tell the jury that a conviction would be justified if they "*could* fairly

be convinced beyond a reasonable doubt of the Defendant's guilt" is obviously not the proper standard for it to apply in determining guilt. A judgment of conviction premised on a finding *by the jurors* that they *could* be convinced of guilt beyond a reasonable doubt, however reasonable that possibility may be, could never be sustained.

As stated by the Court of Appeals in *Grady v. State,* 276 Md. 178, 345 A.2d, 436 (1975), "it is not always appropriate to quote from appellate decisions in jury instructions since the language employed in a particular opinion may not adequately inform jurors of their responsibility [citations omitted]". 276 Md. at 186. In this case, however, both before and after the offending portions of the instructions, the trial judge carefully and fully "inform[ed] the jurors of their responsibility" *not* to "convict the accused *unless,* after weighing all of the evidence, including the evidence of good character, *you are convinced beyond a reasonable doubt that the Defendant was guilty of the crime charged";* that the burden was upon the State *"to prove to your satisfaction beyond a reasonable doubt and to a moral certainty the guilt of an accused"*, that "[e]very accused is entitled to every inference in his favor which can reasonably be drawn from the evidence"; that "where there are two inferences which may be drawn from the same fact or set of facts, one consistent with guilt and one consistent with innocence, the accused is entitled to the inference consistent with innocence"; and that "[n]o greater degree of certainty is required when the evidence is circumstantial than when it is direct, for, in either case, *you, the trier of the facts, must be convinced beyond a reasonable doubt of the guilt of the accused*".

Although we think it was technical error to include the now-challenged portions in the advisory instructions, when

the instructions are viewed in their entirety, we do not think the error was so "plain" or "material to the rights of the accused" as to invoke the exercise of our discretion to correct it under Rule 756 g. *See, Dimery v. State,* 274 Md. 661, 338 A.2d 56 (1975), *cert. denied,* 423 U.S. 1074 (1976); *Brown v. State,* 14 Md. App. 415, 287 A.2d 62 (1972). *See, also, United States v. Brown,* 522 F.2d 10 (9th Cir. 1975); *United States v. Christy,* 444 F.2d 448 (6th Cir., 1971).

The judgment in case no. 751 B will be affirmed.

APPELLANT CRANFORD (CASE NO. 751 A)

At the close of all the evidence, Cranford's motion for judgment of acquittal was denied. In this appeal, he contends that the ruling on the motion was in error. We disagree.

In reviewing the refusal of the trial judge to grant a motion for judgment of acquittal in a jury case, it is our limited function to determine whether the evidence shows directly or supports a rational inference of the facts to be proved, from which the jury could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt of the offense charged. *Vuitch v. State,* 10 Md. App. 389, 271 A.2d 371 (1970). In other words, we must review the relevant evidence and determine whether it is legally sufficient to sustain Cranfords conviction of second degree murder.

The Evidence

At approximately 11:15 A. M. on 26 September 1975, the partially nude body of Mary Ann Bunten was found on the side of Church Road near Bowie, Maryland. The Assistant State Medical Examiner testified that the cause of death was

a stab wound that had severed the left iliac artery in the area of the vagina and rectum, thus causing her to bleed to death "in a matter of minutes". There was also evidence that the alcohol content of the victim's body was .39%, ". . . and [that] one could possibly be comatose with this degree of alcohol".

As a result of information obtained from thoe who had seen Mrs. Bunten during the 24 hour period preceding the discovery of her dead body, Cranford and his brother-in-law, William Lewis Wright, were questioned by the police. Each gave written statements concerning their contacts with Mrs. Bunten. Cranford's statement was introduced in evidence by the State. Wright's statement was not offered by either party.

According to Cranford's statement and his testimony at trial, the following occurred during the evening of 24 September and the early morning hours of 25 September: Cranford and Wright began the evening by attending Cranford's young son's birthday party, where they drank several beers. After the party they went to a restaurant and had more beer. After purchasing a six pack of beer each, they left the restaurant and went to Wilson's Tavern in Cranford's car. As they arrived at Wilson's, at approximately 9:00 P.M., they noticed Mrs. Bunten walking up the roadway near the tavern parking lot. Wright approached her and began talking to her, while Cranford entered the tavern and began "socializing" and drinking more beer. Some minutes later Wright entered the tavern and asked Cranford for the keys to his car. Wright and Mrs. Bunten then left in Cranford's car. Cranford remained inside the tavern "socializing" and drinking until approximately 1:30 A.M. when he went outside to wait for Wright to return with his car.

When Wright and Mrs. Bunten returned, Mrs. Bunten got in the back seat, Wright got in the front passenger seat, and

Cranford got behind the wheel. Cranford asked Mrs. Bunten, whom he had never met before, where she lived. She mumbled an address and the three drove off to find her house. Before leaving the parking lot, however, Wright "reached between the two seats and took" Mrs. Bunten's slacks down. At that point she was "quite drunk and couldn't tell me where she lived. She mumbled an address". He was unable to find her house. After driving around for a short while, he stopped at the parking lot of a steak house where he joined Mrs. Bunten in the back seat and Wright drove the car. While Wright was driving, Cranford attempted to have sexual intercourse with Mrs. Bunten on the back seat but was unable to do so "because of my drunken condition" and because "she was very dry". During the attempt, he was on top of her for "fifteen minutes, probably", during which time she was "conscious" but "quite drunk" and said nothing, nor did Cranford or Wright say anything. Wright then stopped the car and said " 'Let's switch' or something to that effect". Cranford then drove the car while Wright was in the back seat with Mrs. Bunten. Cranford said he did not know "what was going on in the back seat", but he "assumed they were having intercourse". After "approximately 20 minutes", Cranford stopped the car at Wright's request. Wright got into the front passenger seat. At that point Cranford saw that Wright "had blood on his hand and he [Wright] said that the woman had a miscarriage" or "was having her period" and that "we had to let her off".

Cranford stopped the car in a dark and lonely area along Church Road. He assisted Wright in removing Mrs. Bunten from the car. At that point, according to Cranford, she was "unconscious" and Cranford could see by the dome light of the car that she was bloody and that there was a large amount of blood on the back seat of the car. Wright carried Mrs.

Bunten off to the side of the road and left her there. When Wright returned to the car, Wright drove the car to Wright's apartment, where, at Wright's request, Cranford disposed of Wright's bloody clothes.

In his testimony concerning the drunken condition of Mrs. Bunten, the Assistant Medical Examiner testified how a person with .39 per cent, by weight, of alcohol in his blood would act:

> "There would be stupor, there would be a marked decrease in responses to stimuli, and one could possibly be comatose with this degree of alcohol."

It is well settled that unlawful sexual intercourse with a female person without her consent constitutes the common-law felony of rape. It is also settled that unlawful sexual intercourse with a woman who is incapable of giving or withholding consent is rape. *See,* Perkins, *Criminal law,* 2nd Ed., Ch. 2, §5, at 163:

> "One of the leading American cases on the law of rape involved unlawful sexual intercourse with a woman 'so drunk as to be utterly senseless." She had given no consent prior to her insensibility, but counsel urged that it was not 'against her will' because her will was quite inactive one way or the other, and the wording of the statute was 'by force and against her will.' The court pointed out that 'against her will' means 'without her consent,' so far as the law of rape is concerned, and that unlawful intercourse 'with a woman, without her consent, while she was, as he knew, wholly insensible so as to be capable of consenting, and with such force as was necessary to accomplish the purpose was rape.' It is to be emphasized that this was not a case in which defendant had made the woman drunk but merely one in which he had taken advantage of her helpless condition. The court mentioned with approval the 'established rule in England that unlawful and forcible connection with a

> woman in a state of unconsciousness at the time, whether that state had been produced by the act of the prisoner or not, is presumed to be without her consent, and is rape.' 'If it were otherwise," the court added, 'any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such a reproach.' In another case it was held that unlawful intercourse with a woman who had fainted was rape."

It is also well settled that the trier of fact is not obliged to accept as true Cranford's denial of any wrongdoing on his part. *Wilson v. State,* 261 Md. 551 276 A.2d 214 (1971): *Elder v. State,* 7 Md. Ap. 368, 255 A.2d 91 (1969).

Viewing the evidence as a whole we think it permitted a reasonable inference that both Wright and Cranford were guilty of at least murder in the second degree. There can be no question that either Wright or Cranford struck the fata blow. On the evidence the jury could permissibly conclude beyond a reasonable doubt that if Wright was the actual perpetrator of the murder, he committed the crime in the perpetration of or the attempt to perpetrate a rape, and was thus guilty of murder in the first degree under the felony-murder rule pursuant to Md. Code, Art. 27, §410:

> "All murder which shall be committed in the perpetration of, or attempt to perpetrate . . . any rape . . . shall be murder in the first degree."

The jury could have further found that Cranford, who was present and knew of the victim's condition and knew of Wright's unlawful purpose, and who combined with him in the accomplishment of that purpose by his aid and encouragement, was equally guilty of the resulting murder as a principal in the second degree. *See, Mumford v. State,* 19

Md. App. 640, 313 A.2d 563 (1974).

We realize that Cranford was ultimately convicted of second degree murder and was acquitted of first degree murder. We also note that the State did not argue the felony-murder rule at the motion for judgment of acquittal as a reason for denying the motion. As the trial judge did not state his reasons on the record for denying the motion we do not know whether he considered the rule or not. In any event, in reviewing the propriety of a *denial* of a motion for judgment of acquittal on the broad grounds of insufficiency of the evidence, we do not feel that we are restricted to any particula reasons or arguments that may have been advanced by the State at the trial below or on appeal. The question raised and decided below was the sufficiency of the evidence. That is the legal question we now decide, without regard to and independently of any particular arguments or reasons advanced by the State, the appellant or the trial court. Unlike Rule 552, applicable in civil cases, Rule 755 does not require the moving party to state grounds or reasons for granting the motion (other than the broad ground of insufficient evidence), nor does Rule 755 require the State to set forth specifically its reasons why the motion should be denied. *See also,* Md. Code Art. 27, §593.

Moreover, in the case *sub judice,* aside from the felony-murder rule, we think the evidence is such that the jury could have found that Cranford himself was the actual perpetrator of the murder and thus guilty as principal in the first degree of at least second degree murder. The evidence surely warranted a finding beyond a reasonable doubt that either Wright or Cranford struck the fatal blow. In his testimony, Cranford denied that he was the culprit. But as we have seen the trier of fact was not obliged to accept his denial. If the jury, who saw and heard him, concluded, as they had a right

to do, that his denials were false, then *a fortiari,* under the circumstances, they could have reasonably concluded beyond a reasonable doubt that he and not Wright was the one who dealt the moral wound.

After a careful review of all the evidence, we hold that the trial judge correctly denied the motion for judgment of acquittal.

Cranford's Other Contentions on Appeal

1.

The appellant contends that the trial court erred by admitting photographs of the deceased depicting in detail her fatal wound. Admission of photographic evidence rests within the sound discretion of the trial court. *Clarke v. State,* 238 Md. 11, 202 A.2d 456 (1965); *Madison v. State,* 200 Md. 1, 87 A.2d 593 (1952); *Cowens v. State,* 185 Md. 561, 45 A.2d 340 (1946); *See, Anno.* 730 A.L.R.2d 769 (1960). We find no abuse of that discretion here.

2.

The appellant next contends that the jury instruction was "misleading" in several respects. We have carefully examined these contentions and find them to be without merit. The contentions now raised on appeal were either not preseved for our review, Md. Rules 756 g and 1085, or the points complained of were adequately covered by the trial judge in his advisory instructions.

The appellant finally contends that it was error for the trial judge "to submit a charge of first degree murder to the jury". In view of our holding concerning the motion for judgment of acquittal, this contention is likewise without merit. We note also that the appellant made no objections to the trial court's advisory instructions concerning first degree murder or the possible verdicts that the jury could render, including a verdict of "guilty of murder in the first degree". Rules 756 g, 1085.

Having carefully considered all of the appellant's contentions raised in this appeal, we find no reversible error. On the record before us, we think he received, if not a perfect trial, an eminently fair one – and in this imperfect world that is all he was entitled to receive.

JUDGMENTS IN CASE NO. 751B AFFIRMED; APPELLANT WRIGHT TO PAY THE COSTS.

JUDGMENT IN CASE NO. 751A AFFIRMED; APPELLANT CRANFORD TO PAY THE COSTS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1867

JOSEPH LINDSAY CRANFORD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY COMMENTS

This Opposing Brief is filed pursuant to the request of this Honorable Court contained in the letter of its Clerk dated August 29, 1978.

OPINION BELOW

The Order of the Maryland Court of Appeals dismissing certiorari as improvidently granted appears at 282 Md. 255 (1978) and is contained in the Appendix to the Petition for a Writ of Certiorari filed herein. The opinion of the Maryland Court of Special Appeals is reported in 36 Md. App. 293, 373 A.2d 984 (1977), and is

also contained in the Appendix to the Petition filed herein.

JURISDICTION OF THE COURT

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Petitioner, Joseph Lindsay Cranford, was tried and convicted on April 27 and 28, 1976, in the Circuit Court for Prince George's County, Maryland, of second-degree murder, the Honorable Samuel Meloy presiding at a jury trial. On May 3, 1976, he was sentenced to the jurisdiction of the Maryland Commissioner of Correction. From the conviction and sentence, he appealed to the Maryland Court of Special Appeals which affirmed his conviction in *Cranford v. State of Maryland,* 36 Md. App. 393, 373 A.2d 984, decided 6/9/77.

By an Order dated September 8, 1977, the Maryland Court of Appeals granted a Petition for a writ of certiorari to the Maryland Court of Special Appeals, but determined to dismiss the writ on April 3, 1978, as having been improvidently granted. Thereafter, Petitioner filed the within application for a writ of certiorari to this Honorable Court and Respondent's Brief is submitted in accordance with the letter of the Clerk of this Honorable Court dated August 29, 1978.

QUESTION PRESENTED

Was the Petitioner afforded due process of law in a case where his conviction was upheld on the theory of felony murder by the reviewing court where the Trial Judge did not set forth his reasons for denying the motion for judgment of acquittal?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defence.

Amendment XIV

. . . nor shall any State deprive any person of life, liberty or property without due process of law . . .

Annotated Code of Maryland, Article 27, § 616, "Indictment for murder or manslaughter.

. . . in any indictment for murder or manslaughter, or for being an accessory thereto, it shall not be necessary to set forth the manner or means of death. It shall be sufficient to use a formula substantially to the following effect: That A.B., on the _____ day of _____ nineteen hundred and _____, at the county aforesaid, feloniously (wilfully and of deliberately premeditated malice aforethought) did kill (and murder) C.D. against the peace, government and dignity of the State."

STATEMENT OF FACTS[1]

At approximately 11:15 A.M. on 26 September 1975, the partially nude body of Mary Ann Bunten was found on the side of Church Road near Bowie, Maryland. The Assistant State Medical Examiner testified that the

[1] Reprinted in part from the opinion of the Maryland Court of Special Appeals.

cause of death was a stab wound that had severed the left iliac artery in the area of the vagina and rectum, thus causing her to bleed to death "in a matter of minutes". There was also evidence that the alcohol content of the victim's body was .39%, ". . . and [that] one could possibly be comatose with this degree of alcohol".

As a result of information obtained from those who had seen Mrs. Bunten during the 24 hour period preceding the discovery of her dead body, Cranford and his brother-in-law, William Lewis Wright, were questioned by the police. Each gave written statements concerning their contacts with Mrs. Bunten. Cranford's statement was introduced in evidence by the State. Wright's statement was not offered by either party.

According to Cranford's statement and his testimony at trial, the following occurred during the evening of 24 September and the early morning hours of 25 September: Cranford and Wright began the evening by attending Cranford's young son's birthday party, where they drank several beers. After the party they went to a restaurant and had more beer. After purchasing a six pack of beer each, they left that restaurant and went to Wilson's Tavern in Cranford's car. As they arrived at Wilson's, at approximately 9:00 P. M., they noticed Mrs. Bunten walking up the roadway near the tavern parking lot. Wright approached her and began talking to her, while Cranford entered the tavern and began "socializing" and drinking more beer. Some minutes later Wright entered the tavern and asked Cranford for the keys to his car. Wright and Mrs. Bunten then left in Cranford's car. Cranford remained inside the tavern "socializing" and drinking until approximately 1:30 A.M. when he went outside to wait for Wright to return with his car.

When Wright and Mrs. Bunten returned, Mrs. Bunten got in the back seat, Wright got in the front passenger

seat, and Cranford got behind the wheel. Cranford asked Mrs. Bunten, whom he had never met before, where she lived. She mumbled an address and the three drove off to find her house. Before leaving the parking lot, however, Wright "reached between the two seats and took" Mrs. Bunten's slacks down. At that point she was "quite drunk and couldn't tell me where she lived. She mumbled an address". He was unable to find her house. After driving around for a short while, he stopped at the parking lot of a steak house where he joined Mrs. Bunten in the back seat and Wright drove the car. While Wright was driving, Cranford attempted to have sexual intercourse with Mrs. Bunten on the back seat but was unable to do so "because of my drunken condition" and because "she was very dry". During the attempt, he was on top of her for "fifteen minutes, probably", during which time she was "conscious" but "quite drunk" and said nothing, nor did Cranford or Wright say anything. Wright then stopped the car and said " 'Let's switch' or something to that effect". Cranford then drove the car while Wright was in the back seat with Mrs. Bunten. Cranford said he did not know "what was going on in the back seat", but he "assumed they were having intercourse". After "approximately 20 minutes", Cranford stopped the car at Wright's request. Wright got into the front passenger seat. At that point Cranford saw that Wright "had blood on his hand and he [Wright] said that the woman had a miscarriage" or "was having her period" and that "we had to let her off".

Cranford stopped the car in a dark and lonely area along Church Road. He assisted Wright in removing Mrs. Bunten from the car. At that point, according to Cranford, she was "unconscious" and Cranford could see by the dome light of the car that she was bloody and that there was a large amount of blood on the back seat of the car. Wright carried Mrs. Bunten off to the side of

the road and left her there. When Wright returned to the car, Wright drove the car to Wright's apartment, where, at Wright's request, Cranford disposed of Wright's bloody clothes.

In his testimony concerning the drunken condition of Mrs. Bunten, the Assistant Medical Examiner testified how a person with .39 per cent, by weight, of alcohol in his blood would act:

> "There would be stupor, there would be a marked decrease in responses to stimuli, and one could possibly be comatose with this degree of alcohol."

ARGUMENT

I. & II.

THE PETITIONER WAS NOT DENIED DUE PROCESS IN A CASE WHERE HIS CONVICTION WAS UPHELD ON A THEORY OF FELONY MURDER BY THE REVIEWING COURT WHERE THE TRIAL JUDGE DID NOT SET FORTH HIS REASONS FOR DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL AND THE PETITIONER WAS AFFORDED THE FIFTH AMENDMENT PROTECTION OF INDICTMENT BY A GRAND JURY IN THE STATUTORY FORM PROVIDED FOR UNDER § 616 OF ARTICLE 27 OF THE ANNOTATED CODE OF MARYLAND.

Petitioner initially claims that the felony murder theory was never litigated at his trial and that it was first injected into the proceedings at the appellate stage by the Respondent and, in turn, relied upon by the Court of Special Appeals in affirming his conviction. Petitioner goes on to assert that such a procedure ". . . introduced a new charge into the proceedings not contained in the indictment and not litigated at the trial of the case" (Br. 6). Petitioner's assertion that affirming his conviction on the basis of felony-murder was, in effect, the addition of the crime of felony murder is somewhat misleading just as is the contention that a "new charge" was introduced which was not contained in the indictment and not litigated at the trial.

Not only is felony-murder not a separate and distinct crime from murder generally under Maryland law, it should be noted that the crime of murder is a common law offense in Maryland and is only divided into degrees by statutes. *Stansbury v. State,* 218 Md. 255, 146 A.2d 17 (1958); *Lindsay v. State,* 8 Md. App. 100, 258 A.2d 760 (1969). Stated otherwise, murder in the first degree in Maryland is not a crime as such but a classification of the crime of murder. *Lynch v. State,* 9 Md. App. 441, 265 A.2d 283 (1970). As a consequence, under §616 of Article 27 of the Annotated Code of Maryland, an indictment for murder or manslaughter need only use the general language necessary to satisfy the notice requirement of the due process clause and to specify the victim and the date of the occurrence in such a manner that the defendant will be protected in the future from reprosecution in violation of the double jeopardy clause of the Fifth Amendment of the Federal Constitution. *Benton v. Maryland,* 395 U.S. 784 (1969). Contrary to Petitioner's assertion that Maryland law *apparently* does not require separate indictments for premeditated first-degree murder and felony-murder (citing *Weighorst v. State,* 7 Md. 442 (1885)), the above section of the Annotated Code (§ 616 of Article 27), explicitly provides that "it shall not be necessary to set forth the manner or means of death". The net result is that Petitioner attempts to carve out a separate and distinct crime from the crime of murder which under Maryland law classifies both felony-murder and premeditated murder as first-degree murder. Unquestionably, Petitioner was put on notice as to the operative facts by the indictment as prescribed by Maryland law.

Petitioner's reliance on *Ornelas v. United States,* 236 F.2d 392 (9th Cir. 1956), and *United States v. Antelope,* 377 F. Supp. 193 (D.C. Idaho, 1974), *aff'd* on rehearing, 555 F.2d 1376 (9th Cir. 1977), is misplaced. In *Ornelas,* the United States Court of Appeals for the Eighth

Circuit was addressing the question of whether an indictment which contained the statement that the murder was "without premeditation" was defective as charging only second-degree murder, the appellant there having been tried for first-degree murder. In *Antelope* the sole question was whether or not the defendant was afforded ample notice by an indictment which accused the three defendants of murder with malice aforethought while the robbery was charged in count 2 of the indictment. There the court was confronted with whether or not there was sufficient notice pursuant to 18 U.S.C.A. §§ 1111, 1111(a), 1153, and 2111. In the instant case, this court is not confronted with the notice requirement as to any federal statute and, as stated hereinbefore, the form prescribed for an indictment for murder in Maryland unquestionably puts an accused on notice to defend against murder generally rather than any specific degree of murder or manslaughter. The practice of charging murder by the general formula has been approved by the Maryland Court of Appeals in *Neusbaum v. State,* 156 Md. 149, 143, A. 872 (1928), and the Maryland Court of Special Appeals in *West v. State,* 3 Md. App. 123, 238 A.2d 292 (1968). In view of the statutory form of indictment in charging murder in Maryland, the notice requirement is clearly satisfied as is the requirement that the crime be sufficiently charged to prevent a violation of the double jeopardy clause of the Fifth Amendment.

As to the assertion that an indictment must charge with precision and certainty all of the elements necessary to constitute the offense intended to be punished (citing *United States v. Carll,* 105 U.S. 611 (1881)), Respondent most respectfully urges that again the offense has been sufficiently set forth in the indictment and an accused is entitled to no more than notice of the operative facts which need not include the

theory underlying the offense. In *United States v. Smolar,* 557 F.2d 12 (1st Cir. 1977), the First Circuit Court of Appeals held that the defendants were not sufficiently apprised of the nature of the charges against them in a case which involved fraud against the shareholders of a fund in which unregistered warrants having little if any value were purchased at the price of $29,400.00. It is clear that in such circumstances the theory of the prosecution's case is important to permit the accused to defend properly. In *Watson v. Jago,* 558 F.2d 330 (6th Cir. 1977), it was held that "*under Ohio law,* a felony-murder conviction cannot be sustained under an indictment charging first-degree murder with premeditated and deliberate malice". It should be noted that the Ohio Revised Code, § 2901.01, apparently creates a substantive crime of felony-murder in contrast to Maryland which only divides the common law offense into degrees. Thus, none of the authorities cited by the Petitioner are supportive of his claim of a denial of due process.

It is urged by Petitioner that this Court should reconsider the rule laid down in *Hurtado v. California,* 110 U.S. 516 (1984). In response to this assertion, Respondent most respectfully urges that the rule of *Hurtado* is well-founded since the charging process in a criminal proceeding is uniquely a state function and subject to several considerations, including, but not limited to, how the offense is delineated by statute or whether it is derived from the common law. Respondent thus urges that this Court should not disturb that rule in view of the sound underlying rational. In any event, the rule should not be disturbed in the instant case since there is really no constructive amendment between the indictment and the evidence produced against the Petitioner. As set forth in detail hereinbefore, the general formula for charging murder in Maryland incorporates both the offenses of premedi-

tated first-degree murder and felony-murder. Parenthetically, it should be noted that Petitioner was convicted of murder in the second degree and thus the whole discussion is somewhat academic in view of the fact that the asserted change in the theory of the State's case occurred subsequent to the second-degree murder conviction.

Finally, as noted by the Maryland Court of Special Appeals, no reason was given for the denial of the Petitioner's Motion for Judgment of Acquittal and, while it is true that the State of Maryland did not try the case on the theory of felony-murder, the evidence of Petitioner's commission of the felony (attempted rape) was unquestionably before the trial judge for his consideration. The evidence of the Petitioner's attempt to have sexual intercourse having been before the trier-of-fact, the Petitioner had the opportunity and indeed made the attempt — to defend against the sexual offense as well as the murder.

CONCLUSION

Respondent respectfully urges, for the foregoing reasons, that the Petition for a Writ of Certiorari to review the judgment and opinion of the Maryland Court of Appeals be denied.

Respectfully submitted,

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